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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1102

CHARLES W. BOWEN, JR., *et al.*,
Petitioners,

—against—

NEW YORK NEWS INC., *et al.*,
Respondents.

BRIEF FOR NEW YORK NEWS INC., ET AL. IN OPPOSITION TO CERTIORARI

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March 24, 1976.

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Defendant-respondent New York News Inc. ("The News") and all other defendants-respondents except Michael and Vito Lepore (who are separately represented) oppose the petition for certiorari for the reasons stated herein.

Counterstatement of the Case

Petitioners are independent "route dealers" who here attack under the antitrust laws a franchise system of home delivery distribution of newspapers published by The News in which petitioners have never participated (1257a*).

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* Page references are to "a" pages in the Appendix below, except for references to the Second Circuit's decision, which are to pages of its Slip Opinion, 5031 et seq. (2d Cir. 7/23/75) reprinted as Appendix B to the petition.

After a trial of liability issues without a jury, the District Court entered judgment that petitioners recover treble damages in amounts to be determined at a later trial (1336a). The judgment depended primarily on its holding that The News' franchise agreements constituted illegal price fixing agreements "not exempted from the antitrust laws by the fair trade acts" (1265a).

The Second Circuit disagreed, holding that "The News' agreements with its franchise dealers meet the requirements of the McGuire and Feld-Crawford Acts and therefore do not violate the Sherman Act" (5059). It accordingly reversed so much of the judgment below as had depended on the price-fixing determination while affirming other parts not affected by that issue, and remanded for further proceedings (5060).

Both decisions turned on paragraph 5 of the McGuire Act, 15 U.S.C. § 45(a)(5), which excludes from the Act fair trade agreements "between wholesalers." The District Court concluded that "The News and its franchise dealers are both wholesalers within the meaning of the McGuire Act" (1281a). The partial reversal resulted from the Second Circuit's determination that "the district court erred in holding that the franchise dealers are 'wholesalers' for purposes of the McGuire Act" (5049), which, it noted, stemmed from the erroneous conclusion that The News' franchise dealers "function as wholesalers in selling to their carrier boys" (5043).

In explaining its holding, the Second Circuit recognized that "facial support" for the District Court's conclusion existed in language in the franchise agreements and in characterizations of the franchise systems by witnesses, but held that insufficient to satisfy the legal standard for application of the McGuire Act under *United States* v.

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McKesson & Robbins, Inc., 351 U.S. 305, 312 (1956), which it restated as follows (5044):

> "The characterizations used by parties in their agreements, however, while a factor to be considered, are not binding on the court, which must look to the substance rather than to the parties' formal description of their relationship in determining whether there has been compliance with the McGuire Act."

The Second Circuit proceeded to delineate (5044-49) the relationship between The News' franchise dealers and their 12-15 year old carrier boys, and concluded that, ignoring form and considering substance, these franchise dealers were not wholesalers but retailers in that their carriers are "simply boys engaged by the franchise dealers to make deliveries" (5045).

The "route dealer" and "franchise dealer" systems and the events leading to this litigation are well described in the Second Circuit's decision (5034-8). In disregard thereof, the petition includes a 13-page "Statement of the Case", full of irrelevancies and assertions unsupported by the record, let alone by any finding below. We correct only those assertions which seem material to the argument, and at the point where such materiality appears.

Reasons for Denying Certiorari

I.

The Controlling Statutes Have Been Repealed.

Both decisions below turned primarily on construction and application of the McGuire Act, 15 U.S.C. § 45, and the New York Feld-Crawford Act, N.Y. Gen. Bus. L. § 369-a. Both these statutes have now been repealed. 89 Stat. 801

(1975); N.Y.L. 1975 c. 65 §1. Hence, the petition raises no question of importance to the public. See *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955); *Triangle Improvement Council* v. *Ritchie*, 402 U.S. 497, 498 (1971) (Harlan, J., concurring).

II.

Trial on the Merits Has Not Been Completed.

The District Court adjudged that 22 of the original 53 plaintiffs were "entitled to recover treble damages under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, in an amount to be determined by the Court at a continued trial on the damages question" (1336a). In reversing because of error in applying the McGuire Act, the Second Circuit affirmed a part of the judgment which was based upon a separate finding unaffected by that Act, that is, "that The News combined with certain franchise dealers in violation of § 1 of the Sherman Act to prevent some plaintiffs from obtaining copies of the News" (5059-60a). The case was then remanded to the District Court for "a hearing to determine the extent to which each franchise dealer participated in the conspiracy to prevent independents from competing in territories serviced by them and to receive proof of any damages suffered by plaintiffs as a result of the actions of the various defendants" (5060).

The hearing on the merits ordered by the Second Circuit has not yet been held. Thus, the case is not ripe for review by this Court. Cf. *Arnold* v. *United States*, 263 U.S. 427 (1923).

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III.

Petitioners' Six Points Show No Reasons to Grant Certiorari.

Answering Point I

In considering only appearances and ignoring the substance of the relationship between The News' franchise dealers and their carrier boys, the trial court failed to apply the proper legal standard in McGuire Act cases. Thus, the error the Second Circuit corrected was one of law, and so the "clearly erroneous" limitation of F.R.C.P. Rule 52(a) on orders setting aside findings of fact has no application. See *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44 (1960).

The petition (p. 26) asserts that in looking to the substance of the relationships, the Second Circuit "made many findings of fact *de novo*." Implicitly, then, petitioners admit that in applying the legal standard established by *McKesson*, the Second Circuit set aside no contrary findings of fact.

The trial court's opinion had neglected altogether to make any findings as to how franchise dealers and their carrier boys actually function which would show the substance of their relationship for McGuire Act purposes. After correcting the legal standard, the Second Circuit had a right thus to supplement the trial court's fact findings. See *United States* v. *General Motors Corp.*, 384 U.S. 127, 141-2, n.16 (1966). Since there was no jury and no substantial conflict of testimony affected the classification of franchise dealers for McGuire Act purposes, the Court of Appeals was fully competent to make the required determination. *Orvis* v. *Higgins*, 180 F.2d 537 (2d Cir.), cert. den. 340 U.S. 810 (1950).

Petitioners' Point I attacks these supplementary findings as "inconsistent with the record" (p.26). They even append a new exhibit (p.45), said to show "that the boys sold to the consumers" (p.25). But that begs the question. Incidental sales activities of delivery boys nowise prove that for McGuire Act purposes they are retailers rather than employees of The News' franchise dealers.

Petitioners also claim "admissions" in trial colloquy (p.24), but these were affected by petitioners' delay until mid-trial to announce their new theory that franchise dealers should be classified as wholesalers for McGuire Act purposes (860a). Previously, their complaint had treated franchise dealers as retailers selling to consumers (16a), as had their prior petition to this Court for certiorari herein, No. 70/1271, at 4, *sub nom. Davis* v. *News*, 401 U.S. 994 (1971). Thus, in context, none of the cited colloquy has sufficient formality or conclusiveness to be a judicial admission. *Berner* v. *British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532, 542 (2d Cir. 1965), cert. den. 382 U.S. 983 (1966).

There is no conflict with *Blankenship* v. *Hearst Corp.*, 519 F.2d 418 (9th Cir. 1975). It was not a McGuire Act case, and the outcome on appeal would have been the same if the plaintiff's carriers had been classified as employees.

At most, petitioners' Point I shows only that the conclusions of the Second Circuit depended upon appreciation of circumstances which may admit of different interpretations. Hence, certiorari should be denied under the usual rule of non-interference. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502-3 (1951).

Answering Point II

The District Court held that the institution of The News' franchise system was not an attempt to monopolize (1295a), but rather was in response to the failure of its efforts to meet competition of suburban newspapers using the old route dealer system (1261a). These findings disposed of the arguments petitioners had made at the cited pages 49-77 of their post-trial brief and make inappropriate their reliance now (p.31) on precedents involving efforts to extend market dominance.

Of the 22 petitioners, only 13 recovered as terminated route dealers who had failed to accept an opportunity to become a franchise dealer (fns. 1262a,-3a,-84a), but there were no territorial restrictions imposed by The News on route dealers (1259a, n.4) and none of these 13 petitioners was shown to have been deterred from accepting a franchise by territorial provisions of the proposed franchise agreement. Hence, no conflict exists with *Noble* v. *McClatchy Newspapers*, —— F.2d —— (9th Cir. 1975), [1975-2 Trade Cas. ¶60,594] in which a terminated newspaper dealer was awarded a new trial because of evidence that his termination resulted from enforcement of a restriction in *his* contract with the publisher.

Answering Point III

The repeal of the McGuire Act makes doubly inappropriate petitioners' invitation for this Court to review the determination of the trial court (1272a), affirmed by the Second Circuit (5041), that paragraph 2 of the Act was satisfied in that The News "is in free and open competition with commodities of the same general class produced or distributed by others." *Associated Press* v. *United States*, 326 U.S. 1 (1945), established at most that newspaper publishers are entitled to no uniquely favorable treatment

under the antitrust laws, and not that those laws are to be applied with especial severity in newspaper industry cases, as petitioners seem to suggest. Cf. *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594 (1953).

Petitioners' invitation for a review of the finding of competition remains subject to the trial court's observation. "Plaintiffs have simply not shown that a person contemplating home delivery of the News would not consider as an alternative, home delivery of the New York Times, Newsday, the Long Island Press or any one of a number of other newspapers" (1300a).

Answering Point IV

Petitioners admit (p. 34) that the Second Circuit acknowledged their standing to attack customer provisions in The News' franchise agreements (5054). Thus, the claim (pp. 35-7) of conflict with two Ninth Circuit decisions and with three dicta of this Court relates only to the conclusion that petitioners "lack standing to challenge The News' practice of restricting franchise dealers territorially" (5059).

In the first of these Ninth Circuit decisions, the cited dictum in *Hawaii* v. *Standard Oil Co. of California*, 405 U.S. 251, 264 (1972) was construed to establish "twin requisites for standing" (a) that plaintiff show injury to interests of his in commercial enterprises, and (b) that such injury have been occasioned by reason of an antitrust violation. The Ninth Circuit then discussed at length shades of difference among precedents in various circuits in applying "the second prong of the standing formulation." *In re Multidistrict Vehicle Air Pollution, M.D.L. No. 31*, 481 F.2d 122, 126 et seq. (9th Cir.), cert. den. 414 U.S. 1045 (1973). But that discussion is immaterial herein because the lack of standing of petitioners results from their

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failure to satisfy the first requisite, injury (5054). The petition cites no record evidence, let alone any fact finding, indicating that restriction by The News of territories for resales by franchise dealers with whom petitioners compete did or could in any way injure petitioners. Their citation (p. 34) to indications that a few of the petitioners competed with several franchise dealers does not avoid the analysis that territorial restrictions on sales by these competitors could only benefit petitioners.

Likewise, no conflict exists with *Noble* v. *McClatchy Newspapers*, —— F.2d —— (9th Cir. 1975), [1975-2 Trade Cas. ¶60,594]. As noted in our answer to petitioners' Point II, that case concerned termination of a newspaper dealer in alleged enforcement of a territorial restriction in *his* contract with the publisher. Nothing there supports petitioners' claim of standing to attack territorial provisions in franchise agreements to which petitioners were not parties. They simply are not "victims" of the asserted territorial restraints within the meaning of the dicta they cite in *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) and *Radovich* v. *National Football League*, 352 U.S. 445, 454 (1957).

As to customer restrictions, the various petitioners will have adequate opportunity at the further trial ordered by the Second Circuit to recover any damages to their respective route dealer businesses resulting from an inability to obtain copies of the News due to enforcement of customer restrictions in agreements between The News and its franchise dealers (5060).

Answering Point V

Petitioners' assertion (p.39) that herein the Second Circuit "for the first time, imported the requirement of intent" into a Section 2 conspiracy case ignores its prior

statement of this requirement in *United States* v. *Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1961). Their citation to *Nash* v. *United States*, 229 U.S. 373, 378 (1913), further shows the primacy of intent in such cases; it held a Section 2 violation may exist without overt acts to achieve monopoly where

> ". . . the intent alleged would convert what on their face might be no more than ordinary acts of competition or the small dishonesties of trade into a conspiracy of wider scope, as has been explained more than once" [at 378].

Petitioners acknowledge that both courts below "found that there was no such specific intent to monopolize" (p.39), but ask that this Court "if it should rule that intent must be proved, reverse the findings as clearly erroneous" (p.42). They then devote most of their Point V to factual assertions which conflict with the record and findings.* No basis to grant certiorari is thereby shown. See *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502-3 (1951).

Certiorari is further inappropriate because no incremental damages are shown to be recoverable on reinstate-

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* The "explanation of The News' adoption of the franchise program" which the petition demands (p. 40) is in the findings as to the failure of the old route dealer system to build circulation (1261a) and need to meet competition (1272a). The asserted inference of "predatory motive" in that "The News felt compelled to lose several million dollars" (pp. 40-1) is negated by management's recommendation of the franchise program as "a cheap way of acquiring additional circulation" (1451a), and conflicts with the finding that The News had no predatory purpose (1315a). Exhibits F and I (1406a, 1412a), cited as showing a "horrendous" effect on competition (p. 4), actually show that in 1972 The News was selling directly to eight more dealers than in 1965, and that does not take into account dealers (like most of these petitioners) who were obtaining the News from indirect sources.

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ment of the Section 2 findings of the District Court beyond those to be recovered on rehearing pursuant to the partial affirmance of the finding of a Section 1 violation (5060).

Answering Point VI

Only five of the 22 petitioners had Robinson-Patman claims, for they are the only ones "who compete with franchise dealers and purchase from The News" (1311a). The Second Circuit affirmed (5060) the dismissal of their claims in that "they have failed to prove any discriminatory transactions took place 'in commerce'" (1312a). Petitioners acknowledge the direct support of this result in this Court's decision in *Gulf Oil Corp.* v. *Copp Paving Co. Inc.*, 419 U.S. 186 (1974), but nonetheless suggest a distinction in that newsprint, ink and other ingredients used in publishing the News move in commerce (p.43). That is an invalid distinction. *Scranton Construction Co., Inc.* v. *Litton Industries Leasing Corp.*, 494 F.2d 778, 781 (5th Cir. 1974), cert. den. 419 U.S. 1105 (1975); *Belliston* v *Texaco, Inc.*, 455 F.2d 175 (10th Cir.), cert. den. 408 U.S. 928 (1972).

Petitioners further assert (p.44) that §§ 2(d), 2(e) and 2(f) of the Robinson-Patman Act, 15 U.S.C. § 13, "do not contain any requirement that the purchase be 'in commerce.'" This assertion conflicts with the statutory language of §§ 2(d) and 2(f). While the phrase "in commerce" is indeed missing in § 2(e) relating to discrimination in furnishing services or facilities to purchasers, the five petitioners who buy from The News neither pleaded nor proved any furnishing of services or facilities discriminatory as to them, nor was any finding made thereof by either court below.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Attorney for all Respondents except Michael and Vito Lepore

March 24, 1976.

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